Ken KILPATRICK and Cherie, Kilpatrick, Appellants,

v.

STATE of Florida, Appellee.

No. AC-176

District Court of Appeal of Florida, First District,

Sept. 17, 1981

McCord, Judge.

This is an appeal from the trial court's order withholding adjudication of appellants' guilt and placing them on probation after their pleas of nolo contendere to possession of narcotic paraphernalia and possession of a controlled substance. The pleas preserved the appellants' right to appeal the trial court's denial of their motion to suppress, which the parties stipulated was dispositive of the case. We reverse. At the motion hearing, police officer Ron

Steverson testified that on August 20, 1980, he received a confidential tip that appellants had marijuana plants growing at their residence. He stated that because the tip was insufficient to support a search warrant, he proceeded to the farm of appellant Ken Kilpatrick's father Dillon Kilpatrick, on which appellants lived, to talk to Dillon, whom he knew, about the information he had received. He stated that he left the public road and entered the farm on a private road looking for Dillon's house. He passed a brick home and a trailer (the trailer was Dillon's home) without stopping to ask for directions, thinking, he explained, that Dillon lived farther back on the property. He proceeded on down the private road for about one-half mile when he came to another trailer (appellants') and saw marijuana plants growing outside the trailer. He stated

that he then went back down the road to radio another policeman, who later came to the scene, and that Dillon drove up to appellants' trailer about one-half hour later. Ken Kilpatrick arrived subsequently, and after confronting him with his discovery of the marijuana and arresting him, Steverson obtained Ken's consent to search the trailer wherein he found a pound of marijuana and drug paraphernalia.

Appellants contend that the warrantless seizure of marijuana at their trailer was not justified under the "plain view" exception to the search warrant requirement since Steverson did not make his observation from a place where he had a lawful right to be. They argue that they had a reasonable expectation of privacy at their trailer, one-half mile inside of private property, and that they were

entitled to be free from unreasonable government instrusion. We agree. Steverson, without a warrant, entered this private property where he had been told marijuana was growing to see Dillon Kilpatrick in furtherance of investigation of the tip he had received. Not knowing where Dillon's residence was located, he passed a brick house and a trailer where Dillon lived without making any inquiry but proceeded on back into the private property for about a half mile until he came to the second trailer where the marijuana was growing.

The circumstances of this case are analogous to those in State v. Morsman, 394 So.2d 409 (Fla. 1981), in which the Supreme Court held that citizens have a reasonable expectation of privacy in their backyards. There, an officer, having received information from a neighbor that

marijuana was growing in the defendant's backyard, knocked on the front door and received no answer. He then proceeded to the backyard where he saw the plants in "plain view." The court rejected the plain view argument since the plants were not visible from the street or from a neighbor's yard. Steverson's act of driving one-half mile down a private road through the private property after passing two dwellings along the way is equivalent to an officer going directly to the backyard of a house without even knocking first at the first door to make his inquiry. Steverson, under the circumstances when he arrived at the trailer, was at a place where Ken Kilpatrick had a reasonable expectation of privacy, and, therefore, his observation of the marijuana plants was the result of an

invalid search and the fruits thereof should have been suppressed.

Appellee's contention that Ken had no standing to question the validity of the search because he did not own the farm is without merit. The trailer where the marijuana was found was his residence. The cases relied upon by appellee on the standing question are cases which ruled that one does not have standing to question a search of another's residence or another's personal property. Appellant had standing to question the validity of a search of his own residence and the curtilage thereof. Compare Mixon v. State, 54 So.2d 190 (Fla. 1951).

Appellants also contend that the consent to search their trailer was not freely and voluntarily given due to the unconstitutional taint resulting from the illegal seizure of the growing plants

outside the trailer. We agree. Steverson obtained Ken's consent as a direct result of the illegal arrest which was predicated upon the fruits of the unconstitutional search. Therefore, under the facts of this case, the consent did not relieve the search of its unconstitutional taint. Bailey v. State, 310 So.2d 22 (Fla. 1975).

REVERSED.

ROBERT SMITH, Chief Judge, and MILLS, J., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEN KILPATRICK and
CHERIE KILPATRICK ,

Appellants,

-vs- CASE NO. AC-176

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING EN BANC

Comes now Appellee, the State of Florida, by and through the undersigned counsel, and pursuant to Fla.R.App.P. 9.330(c), requests the Court grant rehearing en banc in the above-styled cause. In support of this motion, Appellee states as follows:

1. In its opinion reversing the trial court's denial of Appellant's Motion to Suppress, the Court simplistically framed

the issue as an illegal search because the police officer was not in a place where he had a right to be when the contraband was seen growing in plain view. However, the State asserts that the Court overlooked the correct legal theory to be utilized with the facts of this case.

First, the Court somehow concluded that Appellants' had standing to object to the seizure of the contraband, even though the record reveals that the land upon which the marijuana plants were seized belonged to someone else (R 27,41,46). The Court apparently concluded that the contraband was found on the curtilage of Appellant's leasehold interest and cited Mixon v. State, 54 So.2d 190 (Fla. 1951), for that proposition. However, the Court's reliance on Mixon is improper. In that case, several defendants had been arrested after having been found possessing contraband in

"an empty and untenanted house." They tried to establish standing by showing that one of them had leased the house for two months. However, the Supreme Court of Florida upheld the trial court's apparent factual determination that no leasehold existed. The case never held that a defendant whose leasehold interest is merely a house trailer surrounded by land lived upon and owned by someone else can object to seizure of contraband on the land outside the leasehold interest. Has the Court apparently concluded that the curtilage of Appellants' land includes the entire property owned by Appellant Ken Kilpatrick's father?

Moreover, in Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387, 401 (1978), the United States Supreme Court emphasized that "arcane distinctions developed in property and tort law" were

not controlling when determining whether a defendant had a reasonable expectation of privacy in the area or premises searched. Yet this Court found that Appellants had a reasonable expectation of privacy in the open field surrounding their trailer even though the contraband was undisputably found on someone else's property.

However, notwithstanding the Court's conclusion that Appellants possessed standing to challenge the search of someone else's property, the Court's opinion completely overlooked the Court's own recent case of Montmorency v. State, So.2d ___, 1981 F.L.W. 1631 (Fla. 1st DCA, opinion filed July 10, 1981). Montmorency is in direct conflict with the decision in Appellants' case and was filed as supplemental authority shortly after it was decided. In that case a different panel of this Court affirmed the trial court's

denial of a motion to suppress under nearly identical facts:

> Acting on a tip that marijuana was being grown on appellant's property, two officers drove through an open gate into a pasture adjacent to appellant's property, parked their car, and crossed over a fence into a rough wooded portion of appellant's property. Prior to crossing the fence they did not see the growing marijuana, but it was seen by them after traveling a distance of some 300 feet inside the fence. From the point where the growing marijuana was found the officers could not see appellant's house trailer, which was located within the fenced property approximately 750 to 800 feet distant. After appellant was observed watering the plants she admitted it was her property, and she was arrested. At a point on adjoining property other than the place where the two officers crossed the fence it was possible to observe the growing marijuana plants from outside the fenced area. However, the officer who made this observation testified that the marijuana would not have been seen from this vantage point had not the two officers already located the marijuana on the property. (Footnote omitted).

The Court concluded that the defendant had no reasonable expectation of privacy in the marijuana which had been observed growing in an "open field" located in an area disassociated within the traditionally defined curtilage of the property. It is very significant to note that the Court recognized in a footnote that the fact that the officers were trespassing was not dispositive of the Fourth Amendment issue. See n.3 at 1981 F.L.W. 1633.

The Court also overlooked or misapprehended the State's reliance on the principle of law enunciated in State v. Belcher, 317 So.2d 842 (Fla. 2d DCA 1975). (Cited in Montmorency in n.3.) In that case, the court upheld a warrantless search and seizure after police officers had driven on to the defendant's front yard and then walked to the front porch where the defendant was sitting. The court

specifically found that the officers were not trespassers and that they had a right to go across the defendant's property to investigate the suspicious activity. The court then stated that assuming for the sake of argument the police officers were trespassers, the otherwise valid search and seizure would still be upheld.

To support that argument, the court relied upon Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed.2d 898 (1924). In Hester, the Supreme Court of the United States refused to suppress contraband seized after revenue agents observed Hester hand moonshine whiskey to another person. Although the revenue agents had entered Hester's father's property and approached Hester's father's house, the exchange of contraband occurred outside the house in an open field. The Court held that the special protection

afforded by the Fourth Amendment did not extend to open fields. The State asserts that Appellants' situation is directly on point with the decision in Hester and that the Court's conclusion that Officer Steverson's driving down the private road amounted to the functional equivalent of an invasion of Appellants' backyard is not sound. Rather, Appellants' case is more like the facts of Montmorency, supra.

Finally, the Court's opinion overlooked the rationale of the United States Supreme Court's opinion in Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). There, a state health inspector had entered the defendant's outdoor premises without the defendant corporations's knowledge or consent in order to make a pollution check of air being emitted from the corporation's

chimneys. The United States Supreme Court reversed the lower courts which had found a Fourth Amendment violation:

> The Court in Hester v. United States, 265 US 57, 68 L.Ed 898, 44 S Ct. 445, speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded. Under the Noise Control Act of 1972, 86 Stat 1234, 42 USC §§4901 et seq. (1970 ed, Supp II), [42 USCS §§4901 et seq.], an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. The invasion of privacy in either that case or the present one, if it can be said to exist, is abstract and theoretical. The EPA regulation for conducting an opacity test requires the inspector to stand at a distance equivalent to approximately two stack heights away but not more than a quarter of a mile from the base of the stack with the sun to his back with a vantage point perpendicular to the plume; and he must take at least 25 readings, recording the date at 15- to 30-second intervals. Depending upon the lay-out of the plant, the inspector may operate within or

> without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in Hester.
>
> [Citation omitted]

Id. at 416 U.S. 865, 40 L.Ed.2d 611.

2. The court has incorrectly relied upon State v. Morsman, 394 So.2d 409 (Fla. 1981). As the Court stated in its opinion, Morsman stands for the proposition that citizens have a reasonable expectation of privacy in their backyards. The court then stated that the situation involved in Appellants' case was like that involved in Morsman because Officer Steverson's act of driving one-half mile down a private road through private property amounted to the functional equivalent of an officer's going directly to the backyard of the house without even knocking first at the front door to make his inquiry. However, this conclusion by the Court jumps too far. In

fact, in Morsman the Supreme Court had clearly stated that one does not have an expectation of privacy on a front porch where salesmen or visitors may appear at any time. Id. at 409; State v. Detlefson, 335 So.2d 371 (Fla. 1st DCA 1976).

3. Moreover, the State reasserts that assuming arguendo that the seizure of the marijuana plants was illegal, the subsequent search of Appellants' trailer was permissible under the Fourth Amendment. The Court's opinion completely overlooked the United States Supreme Court's decision in Michigan v. DeFillippo, 443 U.S. 31, 40, 99 S.Ct. 2627, 61 L.Ed.2d 343, 351 (1979), in which the court upheld the use of contraband seized after an arrest was made pursuant to an ordinance which was subsequently found to be unconstitutional. Finally, Bailey v. State, 319 So.2d 22, 28 (Fla. 1975), does

not stand for the proposition that all consent given after an illegal arrest is constitutionally tainted. Rather, the Court in Bailey stated that a valid consent could be made after an illegal arrest if the circumstances were strong, clear, and convincing concerning the voluntariness of the waiver. The trial court found that Appellant Ken Kilpatrick's consent was voluntary--the record supports this conclusion, and consequently, this Court must affirm the trial court's ruling. State v. Webb, 398 So.2d 820, 826 (Fla. 1981).

In summary, Appellants failed to show that they had standing to object to the search of Ken Kilpatrick's father's land. The court erroneously concluded that Officer Steverson's conduct in driving down the private road amounted to the functional equivalent of invading Appellant's

backyard. Rather, the contraband was viewable even before Appellants' trailer could be seen (R 27). There was no reasonable expectation of privacy in the area in which the contraband was seized. Moreover, the court incorrectly concluded that Officer Steverson had no right to be in the place from which he viewed the contraband. The law in Florida is clear that a police officer has the right to approach a house in order to answer a complaint or investigate a criminal activity. State v. Belcher, supra. Finally, nothwithstanding the legality of Appellant's arrest, the record reveals that the subsequent consent to search Appellant's trailer was freely and voluntarily made. Therefore, this Court musst accept the trial court's conclusions, and the denial of the Motion to Suppress should be affirmed. State v. Webb, supra.

4. In keeping with the requirements of Fla.R.App.P. 9.330(c), I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: Montmorency v State, ___ So.2d ___, 1981 F.L.W. 1631 (Fla. 1st DCA, opinion filed July 10, 1981).

WHEREFORE, the State asserts that rehearing en banc should be granted because the court overlooked several key legal principles applicable to Appellants' case, and review by the full court is necessary to maintain uniformity among the court's opinions.

Respectfully submitted:

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Attorney General

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(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Phillip J. Padovano, Esquire, P.O. Box 873, Tallahassee, FL 32302, by U.S. Mail this 24th day of September 1981.

LAWRENCE A. KADEN
OF COUNSEL

IN THE SUPREME COURT OF FLORIDA

THURSDAY, DECEMBER 17, 1981

STATE OF FLORIDA,

Petitioner,

-vs-

KEN SCOTT KILPATRICK,

Respondent.

CASE NO. 61,349
FIRST DISTRICT COURT OF APPEAL CASE NO. AC-176

Petitioner's Motion to Stay Proceedings is hereby granted and proceedings in the District Court of Appeal, First District, and in the Circuit Court of the Fourteenth Judicial Circuit in and for Jackson County, Florida, are hereby stayed pending disposition of the Petition for Review filed herein.

Petitioner's Motion to Toll Time for all further proceedings in the case until

the Court disposes of the State's request for discretionary review is granted.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM

C: Hon. Raymond E. Rhodes, Clerk
Hon. Robert L. McCrary, Jr., Judge
Hon. Duan Crews, Clerk

Lawrence A. Kaden, Esquire
Philip J. Padovano, Esquire

SUPREME COURT OF FLORIDA

No. 61,349

STATE OF FLORIDA, Petitioner,

vs.

KEN SCOTT KILPATRICK, Respondent.

[September 14, 1982]

OVERTON, J.

This cause is before the Court on the state's motion to reinstate its petition for discretionary review after an administrative dismissal on the grounds of untimely filing. The real issue is whether a motion for a rehearing en banc before a district court of appeal, which was filed separately and not in conjunction with a motion for rehearing under rule 9.330(a), has the effect of tolling time for filing a

petition for review in this Court until the district court issues its mandate. We hold that the time for petitioning this Court was not tolled because the separately filed motion for en banc review was a nonallowable motion under rule 9.331 and was in fact a nullity. As a result, the administrative dismissal was correct.

For a better understanding of the issues, we set forth chronologically the critical events in this proceeding.

On September 17, 1981, the First District Court of Appeal issued its opinion reversing the trial court.

On September 24, 1981, the state filed a motion entitled "Motion for Rehearing En Banc," in which the state, "pursuant to Fla.R.App.P. 9.330(c), requests the Court grant rehearing en banc in the above-styled cause." At the conclusion of the motion, "the State asserts that rehearing en banc

should be granted because the court overlooked several key legal principles applicable to Appellants' case, and review by the full court is necessary to maintain uniformity among the court's opinions."

On October 13, 1981, the district court of appeal issued its mandate on the opinion filed September 17, 1981.

On October 28, 1981, the state filed a notice to invoke this Court's jurisdiction on the grounds of conflict with a case previously decided by this Court.

On November 4, 1981, this Court administratively dismissed this cause because it had not been timely filed.

The state mistakenly filed its en banc rehearing motion under rule 9.330(c), the rule which pertains solely to rehearing in bond validation matters. By the motion's contents, it appears clear that the state intended the motion to be filed under rule

9.331(c), the en banc rule. Those portions of rule 9.331(c) which are pertinent to the issue in this case read as follows:

> (1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by Rule 9.330 and in conjunction with the motion for rehearing, a party may move for an en banc rehearing, solely on the ground that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.
>
> (3) Formal Order on Motion for Rehearing En Banc. An order on a motion for rehearing en banc shall be deemed denied upon a denial of rehearing or a grant of rehearing without en banc consideration. If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, and may require additional argument.

(Emphasis ours.)

The state contends that its motion as filed tolled the time for any proceedings in the district court until that motion was disposed of, citing Florida Rule of Appellate Procedure 9.300(b) and (d). The state claims that, since the motion for rehearing en banc was not specifically listed in rule 9.330(d), time for petitioning this Court for review was tolled until the district court acted by issuing its mandate.

We reject this contention because the motion as filed is nonallowable under rule 9.331(c) and requires no order or response from the district court of appeal. Rule 9.331(c) clearly states that "in conjunction with a motion for rehearing, a party may move for an en banc rehearing . .

. ." (Emphasis ours.) The rule does not provide for a separate motion for en banc rehearing.

The en banc rule, by its express provisions, does not require a district court to respond to a request for rehearing en banc. If we accepted the state's contention, however, it would mean that the district courts of appeal would be compelled to respond, even though the rule clearly states a vote will not be taken on an en banc rehearing motion unless requested by a judge.

The reasoning behind the "in conjunction with" language is the assurance that each en banc rehearing request will simultaneously be disposed of by the district court's disposition of the traditional rehearing motion and is to eliminate

separate motions for rehearing en banc. Accordingly, the state's motion for reinstatement is denied.

It is so ordered.

ALDERMAN, C.J., ADKINS, SUNDBERG and McDONALD, JJ., Concur BOYD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

First District - Case No. AC-176

Jim Smith, Attorney General and Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida,

for Petitioner

Philip J. Padovano, Tallahassee, Florida

for Respondent

IN THE SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 9, 1982

STATE OF FLORIDA,	**
Petitioner,	**CASE NO. 61,349
-vs-	**
KEN SCOTT KILPATRICK,	**District Court of Appeal, 1st
Respondent.	**District - No. AC-176

On consideration of the motion for rehearing filed by attorney for petitioner,

IT IS SO ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., OVERTON, McDONALD and EHRLICH, JJ., Concur ADKINS and BOYD, JJ., Dissent.

A True Copy

TEST:

C

cc: Hon. Raymond Rhodes, Clerk

Hon. Robert McCrary, Jr., Chief Judge
Hon. Duan Crews, Clerk

Sid J. White
Clerk Supreme Court

Lawrence A. Kaden, Esquire
Philip J. Padovano, Esquire